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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42038

MINNESOTA POWER, INC.

v.

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

Decided: March 9, 1999

In a verified complaint filed, and served on defendant Duluth, Missabe and Iron Range Railway Company (DMIR), on December 30, 1998, Minnesota Power, Inc. (MPI or complainant), alleges that rates to be assessed by DMIR to move complainant's unit trains of coal from a connection with The Burlington Northern and Santa Fe Railway Company (BNSF) at Keenan, MN, to MPI's Laskin Energy Center, a coal-fired electric generating facility near Colby, MN, will exceed a maximum reasonable level.¹ Complainant alleges that DMIR possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed along with related rules and service terms for the movement. Complainant also requests an award of reparations.

Under the general procedural schedule established in Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527 (STB served Oct. 1 and Nov. 15, 1996) (Expedited Procedures), aff'd sub nom. United Transp. Union-III, Legis. Bd. v. STB, 132 F.3d 71 (D.C. Cir. 1998), discovery is to be completed on or before March 15, 1999. On February 16, 1999, MPI filed a motion to compel discovery. DMIR replied on February 22, 1999, and simultaneously filed its own motion to compel discovery. MPI replied to DMIR's motion on March 1, 1999.²

On January 8, 1999, MPI propounded 59 requests for production of documents.³ In a February 8, 1999 response, DMIR produced no documents, but stated that it would do so as soon as practicable, subject to general and specific objections set forth in its response. MPI's motion to

¹ The service was formerly provided by DMIR under a rail transportation contract that expired December 31, 1998. The BNSF portion of the through service is still being provided under contract.

² The parties' prompt responses made it unnecessary to act on their respective requests for an order requiring an expedited response.

³ Twenty-six requests involved variable costs only; twenty-four involved stand-alone costs only; six involved both variable costs and stand-alone costs (SAC); two involved market dominance; and one involved a tariff matter.

compel ensued. MPI notes that the variable-cost information it seeks to discover⁴ consists of data needed to calculate movement-specific costs and carrier-specific Uniform Rail Costing System (URCS) inputs⁵ not otherwise available, and it assails as dilatory DMIR's promise that it will produce documents. Assertedly, MPI cannot, in the time remaining in the procedural schedule,⁶ analyze DMIR's responses for subsequent discovery.⁷

DMIR states in response that it is acting with reasonable diligence to provide discovery, notwithstanding that it lacks standardized data (supra, note 5) and fully computerized records. It also notes that it lacks the manpower to dedicate employees to litigation discovery. Rather, it contends that it has had to divert from their everyday duties senior marketing, legal, and financial officers. Nevertheless, DMIR states, it has begun producing documents on a "rolling" basis, with a projected completion date of March 5, 1999.

The parties have not yet indicated whether this goal was reached.⁸ Moreover, as noted, MPI may yet seek post-production relief with respect to DMIR's objections, and both parties have the opportunity to conduct follow-up discovery in the form of depositions or otherwise.⁹ Thus, it is now

⁴ MPI's motion does not address the market dominance or tariff requests. It also notes that DMIR has stipulated that it will accept the 180% jurisdictional threshold in 49 U.S.C. 10707(d)(1)(A) as the measure of rate reasonableness. Thus, no SAC analysis will be required.

⁵ DMIR, as a Class II rail carrier, is not required to report R-1 and other annual data to the Board. Annual data from Class I carriers is used to create carrier-specific costs under URCS. Thus, the costs of a defendant Class I carrier would be a matter of public record, obviating the need for this sort of discovery.

⁶ MPI's motion was filed on day 48 of the 75-day discovery period.

⁷ MPI does not seek relief with respect to DMIR's general or specific objections at this time, but reserves the right to do so, if necessary, after the documents are produced.

⁸ The record is sketchy because, under Expedited Procedures, the parties no longer submit discovery requests or responses to the Board. In letters filed February 17, 19, and 23, 1999, MPI acknowledged that DMIR had begun to provide discovery, but had fully responded to only two of MPI's document requests. In a letter filed February 25, 1999, DMIR affirmed its proposed completion date and described the extent of its compliance to date. MPI replied in a March 1, 1999 letter, enclosing a summary of documents provided and not provided.

⁹ In addition, DMIR's motion to compel will be addressed in a separate decision of the Board. Among other things, DMIR seeks documents and information regarding intermodal and intramodal alternatives to the use of routings that include DMIR for the movement of coal to Laskin
(continued...)

clear that meaningful discovery cannot be completed under the current schedule and the March 15 deadline must be suspended.

Given the Congressional directive that the Board expedite rate cases, it is unfortunate that the parties have been unable to resolve discovery issues within the allotted time. However, as this case will be decided on the basis of revenues and costs rather than under a traditional SAC analysis, some of the time lost during discovery may be made up in the merits phase of the case. Therefore, the parties will be given the opportunity to resolve these discovery matters under their own schedule. Their failure to do so promptly, however, may require action by the Board.

With respect to MPI's motion, DMIR is directed to complete its production of documents and objections on or before March 15, 1999, and the parties are directed to submit a joint proposal for a new discovery deadline by March 22, 1999.¹⁰ MPI is directed to submit at that time its final objections or other requests for relief regarding DMIR's compliance (supra, note 7).

It is ordered:

1. MPI's motion to compel is granted to the extent discussed above. DMIR must respond or object to each of MPI's January 8, 1999 document requests on or before March 15, 1999.
2. The discovery schedule is suspended until further notice. The parties shall submit a joint proposal for a new discovery schedule on or before March 22, 1999.
3. If MPI requires further relief with respect to DMIR's response to this order, it must request such relief by March 22, 1999.

⁹(...continued)
from MPI's Montana and Wyoming origins. MPI contends that the issue traffic is DMIR's transportation between Keenan and Laskin, and that DMIR's inquiry is barred by the Board's decision in Market Dominance Determinations—Product and Geographic Competition, STB Ex Parte No. 627 (STB served Dec. 21, 1998).

¹⁰ If the parties believe that additional discovery depends on the resolution of DMIR's motion to compel, they should so indicate.

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4. This decision is effective on its date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary